

AMENDED IN ASSEMBLY MAY 1, 2014

AMENDED IN ASSEMBLY APRIL 9, 2014

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 2723

Introduced by Assembly Member Medina
(Coauthor: Assembly Member Fox)

February 21, 2014

An act to amend Sections 11340, 11342.535, 11342.610, 11346.3, and 11346.5 of the Government Code, relating to administrative procedure.

LEGISLATIVE COUNSEL'S DIGEST

AB 2723, as amended, Medina. Administrative procedure: small businesses.

The Administrative Procedure Act governs the procedures for the adoption, amendment, or repeal of regulations by state agencies and for the review of those regulatory actions by the Office of Administrative Law.

Existing law requires the notice of proposed adoption, amendment, or repeal of a regulation to include, among other things, a description of all cost impacts, known to the agency at the time the notice of the proposed action is submitted to the Office of Administrative Law, that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. Existing law defines “cost impact” as the amount of reasonable range of direct costs, or a description of the type and extent of direct costs, that a representative private person or business necessarily incurs in reasonable compliance with the proposed action.

This bill would define “cost impact” to include those direct costs that a representative private person or sole proprietorship, small business, and business necessarily incurs in reasonable compliance with the proposed action.

Existing law requires every state agency to prepare and submit to the Office of Administrative Law a final statement of reasons with the adopted regulation that includes, among other things, an explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses, as defined. Under existing law, a ~~small business~~ “*small business*” does not include, among others, a landscape architect, an architect, or a building designer or an entity organized as a nonprofit *institution*.

This bill would ~~delete instead provide that a “small business” does not include~~ a landscape architect, an architect, or a building designer ~~from that list and would require that~~ with 50 or more employees or an entity organized as a nonprofit ~~to have more than 100 employees in order to not be considered a small business for purposes of the act~~ *institution with more than 100 employees*.

Existing law requires all state agencies proposing to adopt, amend, or repeal a regulation that is not a major regulation or that is a major regulation proposed prior to November 1, 2013, to prepare an economic impact assessment that assesses whether and to what extent the proposal will affect, among other things, creation of new businesses or the elimination of existing businesses within the state. Existing law requires each state agency proposing to adopt, amend, or repeal a major regulation on or after November 1, 2013, to prepare a standardized regulatory impact analysis in the manner prescribed by the Department of Finance. Existing law requires the standardized regulatory impact analysis to address, among other things, the creation of new businesses or the elimination of existing businesses within the state.

This bill would require the assessment to assess whether and to what extent the proposal will affect, and would require the analysis to address, the creation of new businesses or the elimination of existing businesses within the state, including the impact on sole proprietorships and small businesses, as defined.

If a state agency, in proposing to adopt, amend, or repeal any administrative regulation, makes an initial determination that the action may have a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states, existing law requires the state

agency to include certain information in the notice of the proposed action, including, but not limited to, identification of the types of businesses that would be affected.

This bill would require that information to additionally include the size of businesses that would be affected.

Vote: majority. Appropriation: no. Fiscal committee: yes.

State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 11340 of the Government Code is
2 amended to read:

3 11340. The Legislature finds and declares as follows:

4 (a) There has been an unprecedented growth in the number of
5 administrative regulations in recent years.

6 (b) The language of many regulations is frequently unclear and
7 unnecessarily complex, even when the complicated and technical
8 nature of the subject matter is taken into account. The language is
9 often confusing to the persons who must comply with the
10 regulations.

11 (c) Substantial time and public funds have been spent in adopting
12 regulations, the necessity for which has not been established.

13 (d) The imposition of prescriptive standards upon private persons
14 and entities through regulations where the establishment of
15 performance standards could reasonably be expected to produce
16 the same result has placed an unnecessary burden on California
17 citizens and discouraged innovation, research, and development
18 of improved means of achieving desirable social goals.

19 (e) There exists no central office in state government with the
20 power and duty to review regulations to ensure that they are written
21 in a comprehensible manner, are authorized by statute, and are
22 consistent with other law.

23 (f) Correcting the problems that have been caused by the
24 unprecedented growth of regulations in California requires the
25 direct involvement of the Legislature as well as that of the
26 executive branch of state government.

27 (g) The complexity and lack of clarity in many regulations put
28 small businesses, which do not have the resources to hire experts
29 to assist them, at a distinct disadvantage. Given the importance of
30 small businesses within the California economy, it is especially

1 important that regulations that may have significant impacts on
2 the private sectors be evaluated to determine the potential impact
3 on these smaller size businesses.

4 SEC. 2. Section 11342.535 of the Government Code is amended
5 to read:

6 11342.535. “Cost impact” means the amount of reasonable
7 range of direct costs, or a description of the type and extent of
8 direct costs, that a representative private person or sole
9 proprietorship, small business, and business necessarily incurs in
10 reasonable compliance with the proposed action.

11 SEC. 3. Section 11342.610 of the Government Code is amended
12 to read:

13 11342.610. (a) “Small business” means a business activity in
14 agriculture, general construction, special trade construction, retail
15 trade, wholesale trade, services, transportation and warehousing,
16 manufacturing, generation and transmission of electric power, or
17 a health care facility, unless excluded in subdivision (b), that is
18 both of the following:

19 (1) Independently owned and operated.

20 (2) Not dominant in its field of operation.

21 (b) “Small business” does not include the following professional
22 and business activities:

23 (1) A financial institution including a bank, a trust, a savings
24 and loan association, a thrift institution, a consumer finance
25 company, a commercial finance company, an industrial finance
26 company, a credit union, a mortgage and investment banker, a
27 securities broker-dealer, or an investment adviser.

28 (2) An insurance company, either stock or mutual.

29 (3) A mineral, oil, or gas broker.

30 (4) A subdivider or developer.

31 (5) An entity organized as a nonprofit institution with more than
32 100 employees.

33 (6) An entertainment activity or production, including a motion
34 picture, a stage performance, a television or radio station, or a
35 production company.

36 (7) A utility, a water company, or a power transmission company
37 generating and transmitting more than 4.5 million kilowatthours
38 annually.

39 (8) A petroleum producer, a natural gas producer, a refiner, or
40 a pipeline.

1 (9) A manufacturing enterprise exceeding 250 employees.

2 (10) A health care facility exceeding 150 beds or one million
3 five hundred thousand dollars (\$1,500,000) in annual gross receipts.

4 (11) *A landscape architect, an architect, or a building designer*
5 *with 50 or more employees.*

6 (c) “Small business” does not include the following business
7 activities:

8 (1) Agriculture, where the annual gross receipts exceed one
9 million dollars (\$1,000,000).

10 (2) General construction, where the annual gross receipts exceed
11 nine million five hundred thousand dollars (\$9,500,000).

12 (3) Special trade construction, where the annual gross receipts
13 exceed five million dollars (\$5,000,000).

14 (4) Retail trade, where the annual gross receipts exceed two
15 million dollars (\$2,000,000).

16 (5) Wholesale trade, where the annual gross receipts exceed
17 nine million five hundred thousand dollars (\$9,500,000).

18 (6) Services, where the annual gross receipts exceed two million
19 dollars (\$2,000,000).

20 (7) Transportation and warehousing, where the annual gross
21 receipts exceed one million five hundred thousand dollars
22 (\$1,500,000).

23 SEC. 4. Section 11346.3 of the Government Code is amended
24 to read:

25 11346.3. (a) State agencies proposing to adopt, amend, or
26 repeal any administrative regulation shall assess the potential for
27 adverse economic impact on California business enterprises and
28 individuals, avoiding the imposition of unnecessary or unreasonable
29 regulations or reporting, recordkeeping, or compliance
30 requirements. For purposes of this subdivision, assessing the
31 potential for adverse economic impact shall require agencies, when
32 proposing to adopt, amend, or repeal a regulation, to adhere to the
33 following requirements, to the extent that these requirements do
34 not conflict with other state or federal laws:

35 (1) The proposed adoption, amendment, or repeal of a regulation
36 shall be based on adequate information concerning the need for,
37 and consequences of, proposed governmental action.

38 (2) The state agency, prior to submitting a proposal to adopt,
39 amend, or repeal a regulation to the office, shall consider the
40 proposal’s impact on business, with consideration of industries

1 affected including the ability of California businesses to compete
2 with businesses in other states. For purposes of evaluating the
3 impact on the ability of California businesses to compete with
4 businesses in other states, an agency shall consider, but not be
5 limited to, information supplied by interested parties.

6 (3) An economic assessment prepared pursuant to this
7 subdivision for a proposed regulation that is not a major regulation
8 or that is a major regulation proposed prior to November 1, 2013,
9 shall be prepared in accordance with subdivision (b). An economic
10 assessment prepared pursuant to this subdivision for a major
11 regulation proposed on or after November 1, 2013, shall be
12 prepared in accordance with subdivision (c), and shall be included
13 in the initial statement of reasons as required by Section 11346.2.

14 (b) (1) All state agencies proposing to adopt, amend, or repeal
15 a regulation that is not a major regulation or that is a major
16 regulation proposed prior to November 1, 2013, shall prepare an
17 economic impact assessment that assesses whether and to what
18 extent it will affect the following:

19 (A) The creation or elimination of jobs within the state.

20 (B) The creation of new businesses or the elimination of existing
21 businesses within the state, including the impact on sole
22 proprietorships and small businesses, as defined in Section
23 11342.610.

24 (C) The expansion of businesses currently doing business within
25 the state.

26 (D) The benefits of the regulation to the health and welfare of
27 California residents, worker safety, and the state's environment.

28 (2) This subdivision does not apply to the University of
29 California, the Hastings College of the Law, or the Fair Political
30 Practices Commission.

31 (3) Information required from state agencies for the purpose of
32 completing the assessment may come from existing state
33 publications.

34 (c) (1) Each state agency proposing to adopt, amend, or repeal
35 a major regulation on or after November 1, 2013, shall prepare a
36 standardized regulatory impact analysis in the manner prescribed
37 by the Department of Finance pursuant to Section 11346.36. The
38 standardized regulatory impact analysis shall address all of the
39 following:

40 (A) The creation or elimination of jobs within the state.

1 (B) The creation of new businesses or the elimination of existing
2 businesses within the state, including the impact on sole
3 proprietorships and small businesses, as defined in Section
4 11342.610.

5 (C) The competitive advantages or disadvantages for businesses
6 currently doing business within the state.

7 (D) The increase or decrease of investment in the state.

8 (E) The incentives for innovation in products, materials, or
9 processes.

10 (F) The benefits of the regulations, including, but not limited
11 to, benefits to the health, safety, and welfare of California residents,
12 worker safety, and the state's environment and quality of life,
13 among any other benefits identified by the agency.

14 (2) This subdivision shall not apply to the University of
15 California, the Hastings College of the Law, or the Fair Political
16 Practices Commission.

17 (3) Information required from state agencies for the purpose of
18 completing the analysis may be derived from existing state, federal,
19 or academic publications.

20 (d) Any administrative regulation adopted on or after January
21 1, 1993, that requires a report shall not apply to businesses, unless
22 the state agency adopting the regulation makes a finding that it is
23 necessary for the health, safety, or welfare of the people of the
24 state that the regulation apply to businesses.

25 (e) Analyses conducted pursuant to this section are intended to
26 provide agencies and the public with tools to determine whether
27 the regulatory proposal is an efficient and effective means of
28 implementing the policy decisions enacted in statute or by other
29 provisions of law in the least burdensome manner. Regulatory
30 impact analyses shall inform the agencies and the public of the
31 economic consequences of regulatory choices, not reassess
32 statutory policy. The baseline for the regulatory analysis shall be
33 the most cost-effective set of regulatory measures that are equally
34 effective in achieving the purpose of the regulation in a manner
35 that ensures full compliance with the authorizing statute or other
36 law being implemented or made specific by the proposed
37 regulation.

38 (f) Each state agency proposing to adopt, amend, or repeal a
39 major regulation on or after November 1, 2013, and that has
40 prepared a standardized regulatory impact analysis pursuant to

subdivision (c), shall submit that analysis to the Department of Finance upon completion. The department shall comment, within 30 days of receiving that analysis, on the extent to which the analysis adheres to the regulations adopted pursuant to Section 11346.36. Upon receiving the comments from the department, the agency may update its analysis to reflect any comments received from the department and shall summarize the comments and the response of the agency along with a statement of the results of the updated analysis for the statement required by paragraph (10) of subdivision (a) of Section 11346.5.

SEC. 5. Section 11346.5 of the Government Code is amended to read:

11346.5. (a) The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:

(1) A statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation.

(2) Reference to the authority under which the regulation is proposed and a reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.

(3) An informative digest drafted in plain English in a format similar to the Legislative Counsel's digest on legislative bills. The informative digest shall include the following:

(A) A concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and of the effect of the proposed action.

(B) If the proposed action differs substantially from an existing comparable federal regulation or statute, a brief description of the significant differences and the full citation of the federal regulations or statutes.

(C) A policy statement overview explaining the broad objectives of the regulation and the specific benefits anticipated by the proposed adoption, amendment, or repeal of a regulation, including, to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government, among other things.

(D) An evaluation of whether the proposed regulation is inconsistent or incompatible with existing state regulations.

1 (4) Any other matters as are prescribed by statute applicable to
2 the specific state agency or to any specific regulation or class of
3 regulations.

4 (5) A determination as to whether the regulation imposes a
5 mandate on local agencies or school districts and, if so, whether
6 the mandate requires state reimbursement pursuant to Part 7
7 (commencing with Section 17500) of Division 4.

8 (6) An estimate, prepared in accordance with instructions
9 adopted by the Department of Finance, of the cost or savings to
10 any state agency, the cost to any local agency or school district
11 that is required to be reimbursed under Part 7 (commencing with
12 Section 17500) of Division 4, other nondiscretionary cost or
13 savings imposed on local agencies, and the cost or savings in
14 federal funding to the state.

15 For purposes of this paragraph, “cost or savings” means
16 additional costs or savings, both direct and indirect, that a public
17 agency necessarily incurs in reasonable compliance with
18 regulations.

19 (7) If a state agency, in proposing to adopt, amend, or repeal
20 any administrative regulation, makes an initial determination that
21 the action may have a significant, statewide adverse economic
22 impact directly affecting business, including the ability of
23 California businesses to compete with businesses in other states,
24 it shall include the following information in the notice of proposed
25 action:

26 (A) Identification of the types and size of businesses that would
27 be affected.

28 (B) A description of the projected reporting, recordkeeping, and
29 other compliance requirements that would result from the proposed
30 action.

31 (C) The following statement: “The (name of agency) has made
32 an initial determination that the (adoption/amendment/repeal) of
33 this regulation may have a significant, statewide adverse economic
34 impact directly affecting business, including the ability of
35 California businesses to compete with businesses in other states.
36 The (name of agency) (has/has not) considered proposed
37 alternatives that would lessen any adverse economic impact on
38 business and invites you to submit proposals. Submissions may
39 include the following considerations:

1 (i) The establishment of differing compliance or reporting
2 requirements or timetables that take into account the resources
3 available to differing size of businesses.

4 (ii) Consolidation or simplification of compliance and reporting
5 requirements for differing size of businesses.

6 (iii) The use of performance standards rather than prescriptive
7 standards.

8 (iv) Exemption or partial exemption from the regulatory
9 requirements for differing size of businesses.”

10 (8) If a state agency, in adopting, amending, or repealing any
11 administrative regulation, makes an initial determination that the
12 action will not have a significant, statewide adverse economic
13 impact directly affecting business, including the ability of
14 California businesses to compete with businesses in other states,
15 it shall make a declaration to that effect in the notice of proposed
16 action. In making this declaration, the agency shall provide in the
17 record facts, evidence, documents, testimony, or other evidence
18 upon which the agency relies to support its initial determination.

19 An agency’s initial determination and declaration that a proposed
20 adoption, amendment, or repeal of a regulation may have or will
21 not have a significant, adverse impact on businesses, including the
22 ability of California businesses to compete with businesses in other
23 states, shall not be grounds for the office to refuse to publish the
24 notice of proposed action.

25 (9) A description of all cost impacts, known to the agency at
26 the time the notice of proposed action is submitted to the office,
27 that a representative private person or business would necessarily
28 incur in reasonable compliance with the proposed action.

29 If no cost impacts are known to the agency, it shall state the
30 following:

31 “The agency is not aware of any cost impacts that a
32 representative private person or business would necessarily incur
33 in reasonable compliance with the proposed action.”

34 (10) A statement of the results of the economic impact
35 assessment required by subdivision (b) of Section 11346.3 or the
36 standardized regulatory impact analysis if required by subdivision
37 (c) of Section 11346.3, a summary of any comments submitted to
38 the agency pursuant to subdivision (f) of Section 11346.3 and the
39 agency’s response to those comments.

1 (11) The finding prescribed by subdivision (d) of Section
2 11346.3, if required.

3 (12) (A) A statement that the action would have a significant
4 effect on housing costs, if a state agency, in adopting, amending,
5 or repealing any administrative regulation, makes an initial
6 determination that the action would have that effect.

7 (B) The agency officer designated in paragraph (14) shall make
8 available to the public, upon request, the agency's evaluation, if
9 any, of the effect of the proposed regulatory action on housing
10 costs.

11 (C) The statement described in subparagraph (A) shall also
12 include the estimated costs of compliance and potential benefits
13 of a building standard, if any, that were included in the initial
14 statement of reasons.

15 (D) For purposes of model codes adopted pursuant to Section
16 18928 of the Health and Safety Code, the agency shall comply
17 with the requirements of this paragraph only if an interested party
18 has made a request to the agency to examine a specific section for
19 purposes of estimating the costs of compliance and potential
20 benefits for that section, as described in Section 11346.2.

21 (13) A statement that the adopting agency must determine that
22 no reasonable alternative considered by the agency or that has
23 otherwise been identified and brought to the attention of the agency
24 would be more effective in carrying out the purpose for which the
25 action is proposed, would be as effective and less burdensome to
26 affected private persons than the proposed action, or would be
27 more cost effective to affected private persons and equally effective
28 in implementing the statutory policy or other provision of law. For
29 a major regulation, as defined by Section 11342.548, proposed on
30 or after November 1, 2013, the statement shall be based, in part,
31 upon the standardized regulatory impact analysis of the proposed
32 regulation, as required by Section 11346.3, as well as upon the
33 benefits of the proposed regulation identified pursuant to
34 subparagraph (C) of paragraph (3).

35 (14) The name and telephone number of the agency
36 representative and designated backup contact person to whom
37 inquiries concerning the proposed administrative action may be
38 directed.

39 (15) The date by which comments submitted in writing must
40 be received to present statements, arguments, or contentions in

1 writing relating to the proposed action in order for them to be
2 considered by the state agency before it adopts, amends, or repeals
3 a regulation.

4 (16) Reference to the fact that the agency proposing the action
5 has prepared a statement of the reasons for the proposed action,
6 has available all the information upon which its proposal is based,
7 and has available the express terms of the proposed action, pursuant
8 to subdivision (b).

9 (17) A statement that if a public hearing is not scheduled, any
10 interested person or his or her duly authorized representative may
11 request, no later than 15 days prior to the close of the written
12 comment period, a public hearing pursuant to Section 11346.8.

13 (18) A statement indicating that the full text of a regulation
14 changed pursuant to Section 11346.8 will be available for at least
15 15 days prior to the date on which the agency adopts, amends, or
16 repeals the resulting regulation.

17 (19) A statement explaining how to obtain a copy of the final
18 statement of reasons once it has been prepared pursuant to
19 subdivision (a) of Section 11346.9.

20 (20) If the agency maintains an Internet Web site or other similar
21 forum for the electronic publication or distribution of written
22 material, a statement explaining how materials published or
23 distributed through that forum can be accessed.

24 (21) If the proposed regulation is subject to Section 11346.6, a
25 statement that the agency shall provide, upon request, a description
26 of the proposed changes included in the proposed action, in the
27 manner provided by Section 11346.6, to accommodate a person
28 with a visual or other disability for which effective communication
29 is required under state or federal law and that providing the
30 description of proposed changes may require extending the period
31 of public comment for the proposed action.

32 (b) The agency representative designated in paragraph (14) of
33 subdivision (a) shall make available to the public upon request the
34 express terms of the proposed action. The representative shall also
35 make available to the public upon request the location of public
36 records, including reports, documentation, and other materials,
37 related to the proposed action. If the representative receives an
38 inquiry regarding the proposed action that the representative cannot
39 answer, the representative shall refer the inquiry to another person
40 in the agency for a prompt response.

1 (c) This section shall not be construed in any manner that results
2 in the invalidation of a regulation because of the alleged inadequacy
3 of the notice content or the summary or cost estimates, or the
4 alleged inadequacy or inaccuracy of the housing cost estimates, if
5 there has been substantial compliance with those requirements.

O